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Supreme Court, U. S.
FILED
JUL 7 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term 197__

No. 75-5032

CRAWFORD DEAN LOWERY	)	
	)	In Forma Pauperis
v.	)	From North Carolina
	)	State Court Decision
STATE OF NORTH CAROLINA	)	

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Now comes Crawford Dean Lowery, prisoner under a sentence of death, who shows unto and respectfully moves the Court as follows:

1.

That the sentence above referred to was affirmed by the Supreme Court of North Carolina on the 14th day of April, 1975.

2.

That he has been advised that a Petition for Certiorari has merit and he would like to file one.

3.

That, by reason of the matters and things set forth on his affidavit, hereto attached, his poverty prevents him from proceeding in the ordinary course of practice. That by reason of said poverty the State of North Carolina appointed counsel to prosecute his appeal to the Supreme Court of North Carolina, and has also appointed counsel to prosecute a Petition for Certiorari to this Court.

WHEREFORE, he prays the Court that an Order issue granting him leave to proceed in forma pauperis and dispensing with the necessity of prepaying costs or fees and with the necessity of having the record printed in the regular form and style.

This the ___ day of _____, 1975.

Donnell S. Kelly
Attorney for Defendant/Appellant
P. O. Drawer 671
Graham, North Carolina 27253
(919) 227-4657

SUPREME COURT OF THE UNITED STATES

_____, 1975

CRAWFORD DEAN LOWERY)
)
-vs-) AFFIDAVIT
)
STATE OF NORTH CAROLINA)

CRAWFORD DEAN LOWERY, first being duly sworn, deposes and says:

1.

That he has been sentenced to death by a Trial Court of the State of North Carolina; that that sentence has been affirmed by the Supreme Court of North Carolina, highest Appellate Court of North Carolina; and he wishes to Petition the Supreme Court of the United States for a Writ of Certiorari.

2.

That he was convicted of First Degree Rape and was adjudged an indigent and counsel was appointed for him by the Court to prosecute his Appeal to Supreme Court of North Carolina.

3.

That his conviction is and was in contravention of the Constitution of the United States in that:

1. He was convicted by a jury of whom some of the members did not realize a verdict of guilty meant death.

2. He was selected to be tried for his life under a procedure which permits arbitrary choices without scrutiny by either the court or the public.

3. The sentence was cruel and unusual.

And your affiant veritably believes that he is entitled to redress.

4.

That he neither owns nor has any interest in any real property.

5.

That he neither owns nor has any interest in any intangible personal property, such as stocks and bonds.

6.

That he neither owns nor has any interest in any tangible personal property except his wearing apparel and personal belongings.

7.

That he is incarcerated and receives no income from earnings.

8.

That he receives no income from any other sources.

That by reason of his poverty, your affiant is unable to pay the costs of a Petition for Certiorari or give security for such costs.

Crawford Dean Lowery
Affiant

STATE OF NORTH CAROLINA
COUNTY OF Wake

The foregoing affidavit of Crawford Dean Lowery was subscribed and sworn to before me this 2 day of July, 1975.

Notary Public

My Commission Expires:
My Commission [illegible]

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term 197__

No. _____

CRAWFORD DEAN LOWERY, Petitioner	)	
	)	In Forma Pauperis
v.	)	From North Carolina
	)	State Court Decision
STATE OF NORTH CAROLINA, Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NORTH CAROLINA

APPEARANCES

The undersigned hereby enters appearance in this Court in this cause on behalf of, and as counsel for, Petitioner, Crawford Dean Lowery.

_____

Donnell S. Kelly
Attorney for Petitioner
P. O. Drawer 671
Graham, North Carolina 27253
(919) 227-4657

CERTIFICATE

This is to certify that the attached Petition for Certiorari, along with In Forma Pauperis Petition and Affidavit, were this day served upon all parties hereto by depositing three copies of the same in a United States Postal Service mailbox, with first class postage prepaid, addressed to counsel of record for the respondent, viz., Attorney General of the State of North Carolina.

This the 7th day of April, 1975.

_____

Donnell S. Kelly
Attorney for Petitioner
P. O. Drawer 671
Graham, North Carolina 27253
(919) 227-4657

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term 197__

No. _____

CRAWFORD DEAN LOWERY, Petitioner	)	
	)	In Forma Pauperis
v.	)	From North Carolina
	)	State Court Decision
STATE OF NORTH CAROLINA, Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NORTH CAROLINA

INDEX

Opinion Reported----------3

Jurisdictional grounds----------3

Questions Presented----------3

Enactments Involved----------4

Statement of the Case----------5
Material Facts----------5

Argument----------8

IN THE SUPREME COURT OF THE UNITED STATES

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	)	State Court Decision
STATE OF NORTH CAROLINA, Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NORTH CAROLINA

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes your Petitioner, the defendant below, who respectfully shows unto the Court as follows and respectfully petitions the Court that a Writ of Certiorari issue to the end that the judgment and opinion of the Supreme Court of North Carolina, hereinafter described, be reviewed by the Supreme Court of the United States;

WHERE OPINION REPORTED

The Opinion is reported as STATE OF NORTH CAROLINA VS. CRAWFORD DEAN LOWERY in 286 NC 698.

JURISDICTIONAL GROUNDS

1. Under North Carolina practice the decision and the opinion are the same document, and the date of said document is the 14th day of April, 1975 and that is the date of entry.

2. The statutory provision believed to confer jurisdiction is 28 USCA Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

The defendant duly excepted to the Jury Verdict and the Judgment of the Court imposing the sentence of death as shown by EXCEPTIONS NUMBERS NINE (9) and TWELVE (12) (R pp. 46-47) and alleges that under the Eighth and Fourteenth Amendments of the Constitution of the United States the following questions should be reviewed by the Court:

1. Is the penalty of death a cruel and unusual punishment within the prohibition of the Eighth and Fourteenth Amendments when it is imposed (a) upon a defendant convicted of rape, or (b) upon such a defendant in a case where the victim suffered only a bruise to the inside of her mouth?

2. Where the North Carolina death statutes as enacted in 1868 were amended in 1949 to provide for life imprisonment if the jury so recommends, does FURMAN V. GEORGIA, 408 US 238 require that the discretionary proviso rather than the mandatory death sentence must fall?

3. Where data subject to judicial notice shows that only one out of every 55 defendants charged with the crime of rape were actually ever tried for the capital crime of rape and where the law of North Carolina gives the State the unbridled discretion, free from all supervision to (a) refuse to submit a capital bill to the Grand Jury, (b) Ask for an indictment charging a lesser offense, or (c) trying the accused for a lesser included offense only, is such a showing sufficient to establish a constitutional impediment under the Eighth and Fourteenth Amendments to the use of death sentences for rape in North Carolina unless some sort of control over such discretion is established?

4. If capricious or discriminatory exercise of discretion by District Attorney must be established by proof of actual examples in order to invoke the constitutional ban against cruel and unsuual punishment contained in the Eighth and Fourteenth Amendments, do the cases of ASHTON V. KENTUCKY, 384 US 195 and UNITED STATES V. EVANS, 333 US 483, require that the defendant be relieved of such a burden and that it be placed upon the State?

5. Does the Due Process Clause of the Fourteenth Amendment permit a State court death sentence to be predicated upon a verdict rendered by a jury which did not know for certain that the consequences of a guilty verdict was a sentence of death?

6. Do the Eighth and Fourteenth Amendments, as interpreted by FURMAN V. GEORGIA, 408 US 238, in order to prevent covert exercise of discretion in favor of the accused, require that the trial court refrain from informing the jury that a guilty verdict means a death sentence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer

death. Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." (GS 14-21)

STATEMENT OF THE CASE

Petitioner was tried for rape in a State Court of North Carolina. There was a verdict of guilty (R p 46), and a sentence of death by asphyxiation of gas was pronounced. (R p. 47). Petitioner appealed to the Supreme Court of North Carolina and the judgment was affirmed on the 14th day of April, 1975.

On the 21st day of April, 1975 the Honorable Susie Sharp, Chief Justice of the Supreme Court of North Carolina, stayed execution of the judgment pending further orders of the court in order to give Petitioner an opportunity to file a petition for a Writ of Certiorari in this Court.

1. Material Facts:

Miss Lynn Snyder, seventeen years of age, testified that on Saturday, 7 July 1973, she returned to her home in Burlington from Carolina Beach about 6:00 p.m. She went to her brother's house nearby around 7:00 or 7:30 p.m. Frank Coots, a friend of several years, was there, and she asked him if he would ride with her to look for Tommy Wilson, a friend she had met at Carolina Beach on prior occasions. She had seen Tommy's mother while at the beach, and his mother had asked her to give him a message when she returned to Burlington. Frank agreed to accompany her.

They first went to the "Footsball" place near the Alamance County Hospital. Wilson was not there. Later, at about 11:00 p.m., they went to a place known as "Choosie Mothers." Miss Snyder left the car and asked a group of people if any of them knew Tommy Wilson. Defendant answered that he did and offered to take Miss Snyder and Mr. Coots to find him. Defendant and a friend named Danny Cox entered the back seat of Coots' automobile and Cox described the place to which they were going as the meeting place of the "Zulu Club." The car stopped at a wooded area, and Miss Snyder and defendant got out. Miss Snyder told Coots to stay in the car and defendant told Coots to turn off the headlights. Miss Snyder took about four steps and called Tommy Wilson's name. She then decided that Wilson could not be at a place like this and started to turn around. At this point defendant held her arm

and she felt something sharp in her back. Defendant told her to walk straight or he would kill her.

Defendant led her down a path to a sawdust pile. He then cut off her blouse with a knife and struck her several times about the face. He held a knife to her neck, removed her cut-off jeans and underwear and pushed her back on the sawdust pile. While holding the knife at her throat, and while lying on top of her, he removed his pants with his other hand, and in this position attempted to have intercourse with her. He did manage penetration of one or two inches. She did not give him permission to do so.

At this point, Danny Cox emerged from the woods, saying the police had come. Defendant told Cox he could do anything he wanted with Miss Snyder. Defendant and Cox then dragged her about one hundred feet to the other side of the sawdust pile. Five other males then came over the top of the sawdust pile. Miss Snyder was putting her jeans back on when defendant asked the other boys if they wanted to see her naked, and defendant again pulled off Miss Snyder's jeans. Defendant held one of her arms while the other boys ran their hands over her body, and one of the boys put his mouth on her vagina, at which time she screamed. She was then released and allowed to put her jeans on. Defendant made one of the other boys give her his shirt. Defendant told her that if she opened her mouth about what happened, they would kill her.

Miss Snyder then ran down the path and followed the railroad track until she emerged from the woods. She saw headlights and observed an automobile operated by Officer Helm of the Graham Police Department. She sat in the police car but did not at that time tell Helm what happened because she was scared and embarrassed to be connected with "those people." She then got back into the car with Frank Coots and on the way home told him to turn around because she wanted to go to the Graham Police Department and tell them what happened. She arrived at the police department about 1:00 a.m. and talked to Officer Helm for a "couple of hours." She had another conversation with Officer Helm later in the day (Sunday, 8 July) in the presence of her mother, her stepfather and attorney. She had a conversation with Mr. Bill Frick, the administrative assistant for the District Attorney, "sometime after" 8 July.

Miss Snyder's testimony was corroborated by statements previously made by her to the Graham Police and representations of the District Attorney's OFFICE

Dr. Edward B. Sutton, a medical doctor specializing in obstetrics and gynecology, testified that he examined Miss Snyder at 2:55 p.m. on 8 July 1973. No spermatozoa were found in her vagina but spermatozoa might have been washed out since Miss Snyder was in the process of menstruation. He found no bruises or abrasions on her body.

Defendant's testimony:

The defendant is 21 years of age and at the time of the offense resided in a trailer near Burlington, North Carolina. He is a Cherokee Indian. He first saw the prosecuting witness at about 9:00 p.m. on the night in question when she came into an establishment known as "Choosie Mothers". She was asking where a certain individual by the name of Tommy Wilson was. She left but later returned about 11:00 p.m. When she returned the defendant and one Danny Cox saw her outside the building and according to the defendant Cox told her he knew where the boy she was looking for was and that he was at a place known as the Sawdust Pile. She then asked if the defendant and Cox would show her where it was. They agreed and got into the car. The defendant remembers the driver of the car to be a young man by the name of "Frank". The car was driven around for a while and later arrived at the Sawdust Pile. The defendant and Miss Snyder then got out of the car and began walking down some railroad tracks toward the Sawdust Pile. Never at any time, as he testified, did he hold any knife to Miss Snyder. He did saw that he put his hands on her to pick her up to carry her a short way across a muddy area. When they arrived at the Sawdust Pile, the defendant asked Miss Snyder to engage in sexual intercourse with him, at which time she removed her clothing. He stated that he began kissing her and feeling her but that at no time did he remove his clothing nor attempt to have sexual intercourse with her. He further stated that he never held a knife to her throat nor did he strike her. The defendant further stated that he never at any time participated nor aided in any crime against nature perpetrated upon Miss Snyder; that he did observe such an act taking place but he was some distance away and had no part in it.

ARGUMENT

(Question No. 1)

THE DEATH PENALTY FOR NON-INJURIOUS RAPE IS A CRUEL AND UNUSUAL PUNISHMENT PER SE.

The defendant contends that the penalty meted out to him in this case where, according to the physician, there was no evidence of any violence done to the prosecuting witness does not fit the crime for which he was ultimately convicted and that the death penalty imposed upon him is a cruel and unusual punishment under the Eighth and Fourteenth Amendments. Further, the defendant urges that the question of whether or not the death penalty for non-injurious rape is per se a cruel and unusual punishment must sooner or later be resolved and that there is no better set of facts upon which to proceed than those pertaining to him. Certainly the crime of non-injurious rape is less serious than murder and under such circumstances the defendant feels that it would be best to proceed from the lesser capital crimes to the greater.

(Question No. 2)

FURMAN V. GEORGIA DID NOT HAVE THE EFFECT OF STRIKING THE DISCRETIONARY PROVISO OF THE NORTH CAROLINA DEATH STATUTE AND LEAVING THE MANDATORY DEATH SENTENCE IN TACT.

The defendant's argument concerning the Eighth and Fourteenth Amendments before the North Carolina Supreme Court were rejected upon the precedent of STATE V. WADDELL, 194 SE2d 19, STATE V. JARRETT, 202 SE2d 721, STATE V. FOWLER, 203 SE2d 803 and others. The key case among those is, of course, WADDELL, a careful reading of which demonstrates that the difference between the majority and minority of the Court results from differing interpretations placed upon the teaching of FURMAN V. GEORGIA. Briefly, the argument of the majority is that FURMAN strikes down not the death sentence proviso of the statute but rather the jury discretion proviso and hence under the law of this State, with this provision gone the original part of the statute making death mandatory remains inviolate. Hence, the death penalty is now mandatory. The position of the minority, simply stated, is that the effect of FURMAN is to strike the mandatory death provision of the statute and since the abolition of the death sentence cannot absolve the defendant, the effect is simply to reduce the penalty to life imprisonment.

The North Carolina death statute stems from two acts of the Legislature, the first of which made death mandatory and was enacted in 1868. The jury discretion provision became the law by act of the North Carolina Legislature in 1949. With this in mind, the minority further argued that even if FURMAN had the effect of striking the discretionary proviso under the law of North Carolina death sentences cannot be imposed because such was not the intent of the Legislature in enacting the 1949 provision; and at this point in time to return to the mandatory death sentence would be to violate legislative intent. The defendant urges that the position of the minority of the North Carolina Supreme Court is the correct and most logical one, but in the broader sense, the defendant argues that whether the position of the majority or the minority is correct, the matter is as to him a subsisting life and death question which should be resolved without delay.

(Question No. 3)

UNBRIDLED PROSECUTORIAL DISCRETION, ABSENT SUPERVISION OF SOME KIND BY THE COURTS, PRECLUDES THE DEATH PENALTY.

The defendant contends that a reading of FURMAN V. GEORGIA indicates that the exercise of any type of discretion as to the death penalty prevents the imposition of same. It is simply a fact of life in the State of North Carolina that only about one out of every 55 people charged with the capital crime of rape is actually tried for the capital offense of rape. The discretionary decision as to whether or not a certain individual will be tried for his life for the capital crime of rape is solely that of the prosecution. The defendant contends that it was not the intent of FURMAN merely to forbid jury discretion of the imposition of the death penalty, but also the secret or covert type of exercise by the prosecution in deciding who will be tried and who will not.

Certainly some type of judicial supervision of prosecutorial discretion could be exercised without great expense either in money or time. The results obtained would be worth the cost. There are certain facts, for example, present in every rape case which are subject to judicial scrutiny and which tend to weaken the case for the State. For example: (a) Sexual promiscuity of the prosecuting witness; (b) Absence of injury of any kind, especially of the genital area; (c) Absence of cries for help and (d) Long delays in reporting.

(Question No. 4)

THE EFFECT OF ASHTON V. KENTUCKY READ IN CONJUNCTION WITH FURMAN V. GEORGIA OPERATES TO RELIEVE THE DEFENDANT OF THE BURDEN OF SHOWING RACIAL, RELIGIOUS OR CLASS DISCRIMINATION AND PLACES THE PURDEN OF SHOWING ITS ABSENCE ON THE LEGISLATURE.

By so arguing the defendant does not mean to abrogate his position taken above. He maintains and still contends that many persons are favored when it comes to the question of who is to live and who is to die, by factors outside the law and the evidence. If, however, it is the law that the Constitution requires that there be an actual determination of discrimination on the grounds of color, class or religion, etc., then the burden should be upon the Legislature to demonstrate the absence thereof. (ASHTON V. KENTUCKY, 384 US 195.) He further says that a careful reading of FURMAN and ASHTON indicates a requirement that every Legislature should review its practices to the end of informing the public as to whether or not such practices validate death sentences. If this is not accomplisehd, then the invocation of death sentences in every State should be summarily suspended.

(Question No. 5)

A VERDICT BY A JURY IGNORANT THAT DEATH WAS THE MANDATORY CONSEQUENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

At the time of this defendant's conviction it was the law of the State of North Carolina that neither the Court nor counsel for the defendant could divulge the penalty in death cases, but that it was permissible for the State, at least in selecting the jury, to probe into this area. (STATE V. DILLARD 203 SE2d 6, STATE V. JARRETT, 202 SE2d 721 and STATE V. NOEL, 202 SE2d 750.)

As a result, juries, including the jury which convicted this defendant, had an idea that death was possible, but certainly they could not have known that death was mandatory on a conviction of guilty as charged. The upshot is that, at least for the time being, convictions in capital cases will depend largely on how knowledgeable juries are concerning the law. The defendant argues that a system of law which allows juries, ignorant of the nature and consequence of their act, to inadvertently impose the death penalty violates the Eighth and Fourteenth Amendments of the Constitution

of the United States. Further, the basic fairness guaranteed to everyone under the Due Process Clause of the Fourteenth Amendment should require that knowledge of the death sentence by a jury is not a thing which should be vested in the office of the District Attorney.

(Question No. 6)

FURMAN V. GEORGIA DOES NOT FORBID THE JURY BEING TOLD THAT DEATH IS A NECESSARY CONSEQUENCE OF THEIR VERDICT.

The holding of the decisions of the North Carolina Supreme Court cited above to the effect that neither the Court nor defense counsel can divulge information regarding the death penalty was possibly based upon the rationale that the effect of FURMAN was simply to lop off the jury discretionary proviso and hence return the law to the state it was in prior to 1949. Hence, the mandate against divulging the consequences of the verdict to a jury resulted from prior state law. But from a reading of this case it is simply not clear, however, whether the Court was merely applying state law or whether it was acting upon what it believed to be a compulsory teaching of FURMAN.

The defendant urges that it is simply not clear how much the North Carolina Court was influenced by possible misconceptions of the requirements of FURMAN, and how much it was relying upon the prior state law. Such being the case, the defendant maintains the case should be remanded to the North Carolina Supreme Court for clarification.

Respectfully submitted,

Donnell S. Kelly
Attorney for the Petitioner
P. O. Drawer 671
Graham, North Carolina 27253
(919) 227-4657

the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422 at 437, 212 S.E. 2d 113 at 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. CRAWFORD DEAN LOWERY

No. 36

(Filed 14 April 1975)

1. **Criminal Law §§ 31, 169— evidence of another offense — res gestae — similar testimony admitted without objection**

Defendant in a rape case was not prejudiced by the admission into evidence, over objection, of testimony that defendant engaged in a separate and distinct criminal offense against the person of his victim by participating in the crime against nature perpetrated upon her by defendant's friend, since defendant allowed the same evidence complained of to come in without objection many times during the course of the trial; further, the evidence of the commission of the unnatural sex act, when viewed with the other evidence, tended to exhibit a chain of circumstances in respect to the rape charge and was a part of the *res gestae*, and the evidence was admissible even if defendant had promptly objected at each opportunity.

2. **Criminal Law § 128— failure of court to order mistrial on its own motion — error corrected by striking testimony and instructing jury**

The trial court did not err in failing to declare a mistrial on its own motion when a State's witness testified, " . . . if the girl had been raped, the guilty person should be prosecuted," since the court sustained defendant's objection, allowed the motion to strike, and instructed the jury not to consider it.

3. **Criminal Law § 162— prejudicial testimony — failure to object — objection waived**

Defendant in a rape case was not prejudiced by testimony of a witness that the victim had told him that she had studied sociology and the possibility of rape and was advised always to stay calm and try to talk the attacker out of causing her any harm, particularly since defendant did not object to the testimony at trial.

4. **Criminal Law § 162— failure to object to evidence at trial — objection waived**

It is well settled that with the exception of evidence precluded by statute in furtherance of public policy, the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal.

5. **Criminal Law § 86— cross-examination of defendant as to other offenses — propriety**

A criminal defendant may not be asked if he has been arrested or indicted for a specific offense, but he may, for the purpose of impeachment, be asked if he has committed criminal acts or other specific acts of reprehensible conduct, provided the question is in good faith.

6. **Criminal Law § 86— cross-examination as to subsequent rape — propriety — good faith question**

Where the record in this rape case showed that defendant was in fact indicted at the time of this trial for a subsequent rape of another victim, there was ample basis for the district attorney to ask defendant in good faith about the offense, and the trial court did not err in failing to declare a mistrial upon its own motion.

7. **Constitutional Law § 36; Rape § 7— death penalty — constitutionality**

Judgment of death in this rape case does not contravene the Eighth and Fourteenth Amendments to the U. S. Constitution.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to death sentence.

APPEAL by defendant under G.S. 7A-27(a) from *Clark, J.*, at the June 10, 1974 Criminal Session of ALAMANCE Superior Court.

On an indictment proper in form, defendant was convicted of rape and received the death penalty.

Miss Lynn Snyder, seventeen years of age, testified that on Saturday, 7 July 1973, she returned to her home in Burlington from Carolina Beach about 6:00 p.m. She went to her brother's house nearby around 7:00 or 7:30 p.m. Frank Coots, a friend of several years, was there, and she asked him if he would ride with her to look for Tommy Wilson, a friend she had met at Carolina Beach on prior occasions. She had seen Tommy's mother while at the beach, and his mother had asked her to give him a message when she returned to Burlington. Frank agreed to accompany her.

They went first to the "Footsball" place near the Alamance County Hospital. Wilson was not there. Later, at about 11:00 p.m., they went to a place known as "Choosie Mothers." Miss

Snyder left the car and asked a group of people if any of them knew Tommy Wilson. Defendant answered that he did and offered to take Miss Snyder and Mr. Coots to find him. Defendant and a friend named Danny Cox entered the back seat of Coots's automobile and Cox described the place to which they were going as the meeting place of the "Zulu Club." The car stopped at a wooded area, and Miss Snyder and defendant got out. Miss Synder told Coots to stay in the car and defendant told Coots to turn off the headlights. Miss Snyder took about four steps and called Tommy Wilson's name. She then decided that Wilson could not be at a place like this and started to turn around. At this point, defendant held her arm and she felt something sharp in her back. Defendant told her to walk straight or he would kill her.

Defendant led her down a path to a sawdust pile. He then cut off her blouse with a knife and struck her several times about the face. He held a knife to her neck, removed her cut-off jeans and underwear and pushed her back on the sawdust pile. While holding the knife at her throat, and while lying on top of her, he removed his pants with his other hand, and in this position attempted to have intercourse with her. He did manage penetration of one or two inches. She did not give him permission to do so.

At this point, Danny Cox emerged from the woods, saying the police had come. Defendant told Cox he could do anything he wanted with Miss Snyder. Defendant and Cox then dragged her about one hundred feet to the other side of the sawdust pile. Five other males then came over the top of the sawdust pile. Miss Snyder was putting her jeans back on when defendant asked the other boys if they wanted to see her naked, and defendant again pulled off Miss Snyder's jeans. Defendant held one of her arms while the other boys ran their hands over her body, and one of the boys put his mouth on her vagina, at which time she screamed. She was then released and allowed to put her jeans on. Defendant made one of the other boys give her his shirt. Defendant told her that if she opened her mouth about what happened, they would kill her.

Miss Snyder then ran down the path and followed the railroad track until she emerged from the woods. She saw headlights and observed an automobile operated by Officer Helm of the Graham Police Department. She sat in the police car but did not at that time tell Helm what happened because she was

scared and embarrassed to be connected with "those people." She then got back into the car with Frank Coots and on the way home told him to turn around because she wanted to go to the Graham Police Department and tell them what happened. She arrived at the police department about 1:00 a.m. and talked to Officer Helm for a "couple of hours." She had another conversation with Officer Helm later in the day (Sunday, 8 July) in the presence of her mother, her stepfather and attorney. She had a conversation with Mr. Bill Frick, the administrative assistant for the District Attorney, "sometime after" 8 July.

On cross-examination, Miss Snyder testified that she knew dope was used and available at "Choosie Mothers," and that she had smoked pot two years ago. At no time did she ask Frank Coots to accompany her and defendant to the sawdust pile or call for his help. She hesitated to scream because she was afraid she would be killed, but started screaming when one of the boys placed his finger in her rectum. Her vision without glasses is 50-50 and she cannot recognize objects more than four feet away without her glasses. She described the blouse she was wearing as being low-neck and made of flimsy material, and stated that she was not wearing a bra because she was sunburned from the beach.

Mr. Fred Darlington, attorney for the family of Miss Snyder, testified that he was present with Sergeant Helm and members of the Alamance County Sheriff's Department when Miss Snyder identified the defendant as her assailant. On the evening of 8 July he noticed a cut on Miss Snyder's arm and on her upper and lower lip inside her mouth. He testified that Miss Snyder's testimony in court was substantially what she told him during their discussions of the alleged rape.

Sergeant Bobby Helm of the Graham Police Department testified that while on patrol at about 11:45 p.m. on 7 July 1973, he saw Frank Coots in his automobile parked on River Street about 300 to 400 feet south of the sawdust pile. While he was talking to Frank Coots, Miss Snyder emerged from the woods and was crying and upset. She was wearing a green shirt with blood on it and she had blood on her mouth. She told him her name was "Tina" and that she was looking for her friend Tommy Wilson. He could tell she was in no condition to answer questions, so he told her if she wanted to make a statement later to contact the Graham Police Department. She came to the Graham

Police Department at appproximately 2:00 a.m. on 8 July and told officers what happened, and returned about 11:00 p.m. with her mother, stepfather and attorney to make a full statement, which was introduced in evidence and which essentially corroborated Miss Snyder's testimony.

On cross-examination, Sergeant Helm testified that when Miss Snyder emerged from the woods at 12:30 a.m. on the night of the alleged rape, she answered "No" when he asked her if she had been criminally assaulted in any way.

Mr. William W. Frick, administrative assistant for the District Attorney's Office, testified that he interviewed Miss Snyder on 27 September 1973 regarding the circumstances surrounding the alleged rape. Her statement to him was introduced in evidence and essentially corroborated Miss Snyder's testimony.

Dr. Edward B. Sutton, a medical doctor specializing in obstetrics and gynecology, testified that he examined Miss Snyder at 2:55 p.m. on 8 July 1973. No spermatozoa were found in her vagina but spermatozoa might have been washed out since Miss Snyder was in the process of menstruation. He found no bruises or abrasions on her body.

Mark Steven Woods, an acquaintance of defendant, testified that on 7 July 1973 he was a recent initiate of the "Zulu Club," of which defendant was the leader. As an initiation rite he had to fight five individuals at the sawdust pile. He was present when Miss Snyder came to "Choosie Mothers" looking for Tommy Wilson, and heard defendant offer to take her to him. As he entered the car, defendant turned, smiled and said to the others who remained, "Sawdust pile." Defendant then left with Miss Snyder and two others. Shortly thereafter, Woods and four friends left "Choosie Mothers" and went to the sawdust pile. There, Woods saw defendant holding Miss Snyder, who was crying, and saw an individual named "Hoss" commit an oral sex act on her. One or two days later, he heard "Hoss" bragging about committing the oral sex act on Miss Snyder. He also heard defendant say he had tried to put his private parts into Miss Snyder's private parts but could not because she "moved too much and was too tight."

On cross-examination, Mr. Woods stated that he could not see too well in the dark and that he was not positive that "Hoss" was committing an oral sex act

Defendant testified that he led Miss Snyder to the sawdust pile but at no time threatened her with a knife. At the sawdust pile, he asked her if she was going "to give [him] some." She did not respond but allowed him to place his hand inside her blouse. She removed her blouse and pants. At that time, Danny Cox arrived and said the police were there. At no time did defendant remove his clothing or attempt to place his private parts in hers. The other boys then came and he observed Lee "Hoss" Somers commit an oral sex act on Miss Snyder. When he observed her start to fall, he pushed her back on her feet to keep her from hitting the ground. He did not turn to his friends and say "Sawdust pile" before leaving "Choosie Mothers" with Miss Snyder.

Douglas Ferguson testified for the State that he was present at the sawdust pile on 7 July 1973 and saw a "sharp object" in the hand of defendant. On 9 July 1973, he took police officers to an area near the sawdust pile and showed them Miss Snyder's blouse in some bushes where he had seen defendant drop it after the alleged rape. He stayed in the cell with defendant at the Alamance County Jail the night before his testimony in this trial and defendant told him not to testify against him because " . . . you won't live if you do."

Defendant was recalled and denied that he had threatened Douglas Ferguson.

Other facts pertinent to decision are set out in the opinion.

Attorney General James H. Carson, Jr. and Assistant Attorney General Claude W. Harris for the State.

Donnell S. Kelly for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the admission into evidence, over objection, testimony that defendant engaged in a separate and distinct criminal offense against the person of Miss Lynn Snyder by participating in the crime against nature perpetrated upon her.

On direct examination, Miss Snyder testified that after defendant raped her Danny Cox arrived and defendant told Cox he could do anything he wanted to with her. She stated further that five other males appeared and defendant again disrobed

her. All of this was without objection and appears in narrative form.

The following then appears:

"ANSWER BY MISS SNYDER: 'He (defendant) held my arms while another boy held my arm and he gave the boys permission to . . .'

"MR. KELLY: OBJECTION.

"THE COURT: 'THE OBJECTION IS OVERRULED.'"

The record does not set out the question asked nor does it disclose any objection to the question.

After this there is another narrative paragraph where Miss Snyder testified that the defendant held one of her arms and told the other boys that they could do anything they wanted to do with her and that one of the boys put his mouth on her vagina. No objection or motion to strike appears.

1 Stansbury's N. C. Evidence § 27, pp. 69-70 (Brandis Rev. 1973), states:

" . . . In case of a specific question, objection should be made as soon as the question is asked and before the witness has time to answer. Sometimes, however, inadmissibility is not indicated by the question, but becomes apparent by some feature of the answer. In such cases the objection should be made as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it. . . . "

This was not done. The record further discloses that the same evidence complained of came in without objection many times during the course of the trial, and on some occasions in response to questions by defendant's counsel.

On cross-examination, Miss Snyder stated that defendant and another boy held her arms while the other boys kissed and fondled her and while one of them committed the unnatural sex act on her.

Without objection, Officer Helm and Investigator Frick, in corroboration, testified as to Miss Snyder's statements to them regarding the unnatural sex act.

Mark Steven Woods, an eyewitness, told the same story without objection.

Defendant himself told of this act but claimed that Miss Snyder was falling to the ground and that all he did was push her up.

The well established rule is that when evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. 1 Stansbury's, *supra*, § 30; *State v. Little*, 278 N.C. 484, 180 S.E. 2d 17 (1971); *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971); *State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4 (1967). Defendant here allowed similar evidence without objection and therefore lost the benefit of the objection.

Further, under the facts of this case we think the evidence was admissible even if defendant had promptly objected at each opportunity. Ordinarily, the State cannot offer proof of another crime independent of and distinct from the crime for which the defendant is being prosecuted even though the separate offense is of the same nature as the crime charged. 1 Stansbury's *supra*, § 91; *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Such evidence is competent, however, to show "' . . . the *quo animo*, intent, design, guilty knowledge, or scienter, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. [Citations omitted.]'" *State v. Jenerett*, 281 N.C. 81, 89, 187 S.E. 2d 735, 740 (1972), quoting from *State v. Atkinson, supra*. *See* 1 Stansbury's, *supra*, § 92.

The evidence tends to show that when the defendant left the footsball place with Miss Snyder, he turned to several other males, smiled, and said, "Sawdust pile." Several other males arrived at the sawdust pile shortly after the alleged rape, and Lee "Hoss" Somers, with the aid of defendant, committed the unnatural sex act on Miss Snyder. We think the evidence of commission of the unnatural sex act, when viewed with other evidence, tended to exhibit a chain of circumstances in respect to the rape charge, and was a part of the *res gestae*. The evidence was properly admitted. This assignment is overruled.

[2] Defendant next contends that the trial court erred in failing to declare a mistrial on its own motion when the State's witness, Mr. Darlington, testified as follows:

> "QUESTION BY MR. PIERCE: What was your interest in the matter?
>
> "ANSWER BY MR. DARLINGTON: I have a daughter myself and they are close friends of mine and I felt if the girl had been raped, the guilty person should be prosecuted.
>
> "MR. KELLY: Your Honor, we OBJECT and move the answer be stricken.
>
> "THE COURT: SUSTAINED, MOTION ALLOWED, and I instruct the jury not to consider that."

No motion for a mistrial was made. Defendant elected to proceed with the trial and to take his chances with the jury then impaneled. Under these circumstances he may not successfully contend that the court, of its own motion, should have declared a mistrial. ". . . Indeed, without defendant's consent or a motion by him, had the court declared a mistrial, *ex mero motu*, at the onset of the next trial the judge would most certainly have been confronted with defendant's plea of former jeopardy. [Citations omitted.]" *State v. Moore*, 276 N.C. 142, 150, 171 S.E. 2d 453, 458 (1970). " . . . It is only in cases of necessity in attaining the ends of justice that a mistrial may be ordered in a capital case without the consent of the accused. [Citations omitted.]" *State v. Harris*, 223 N.C. 697, 700, 28 S.E. 2d 232, 235 (1943). *Accord, State v. Moore, supra; State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243 (1954). Here, the court sustained the objection, allowed the motion to strike, and instructed the jury not to consider it. We do not believe that this generalized statement made by Mr. Darlington that "*if* the girl had been raped, the guilty party should be prosecuted" (emphasis added) was so inherently prejudicial that its initial impact was not erased by the judge's prompt and emphatic instruction that the jury should not consider it. As Justice Devin (later Chief Justice) said in *State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938):

> "[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so. [Citation omitted.]"

Accord, Highway Comm. v. Helderman, 285 N.C. 645, 207 S.E. 2d 720 (1974); *State v. Moore, supra*. This assignment is overruled.

[3] Defendant next assigns as error the admission into evidence the testimony of the witness Frick that the prosecuting witness in her statement to him said: ". . . [S]he had taken sociology in school and in taking this course they had studied the possibility of rape cases and so forth, and was advised to always stay calm and to attempt to talk the attacker out of causing her any harm and to try to save her life or from getting beat up or scarred for life." The record does not disclose that the defendant made any objection to the testimony of this witness.

[4] It is well settled that with the exception of evidence precluded by statute in furtherance of public policy, which exception is not applicable to this assignment of error, the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal. 1 Strong, N. C. Index 2d, Appeal and Error § 30 (1967); *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973); *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341 (1967); *State v. Howell*, 239 N.C. 78, 79 S.E. 2d 235 (1953). " . . . It is too late after the trial to make exceptions to the evidence. [Citations omitted.]" *State v. Howell, id* at 81-82, 79 S.E. 2d at 237. We do not believe this innocuous statement prejudicial. This assignment is overruled.

[5, 6] Next, defendant assigns as error the failure of the trial court to declare upon its own motion a mistrial after the following question was asked by the district attorney of the defendant on cross-examination: "On April 5, 1974, didn't you insert your private parts into Kathy Cox?" The court then said, "When?" When told "April 5, 1974," the court sustained the objection. The trial court's ruling was error in favor of defendant. Defendant concedes that under the rule in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), the solicitor properly asked this question. In *Williams*, it is stated:

> "It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning col-

lateral matters relating to his criminal and degrading conduct. [Citations omitted.] Such questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith." *Id.* at 675, 185 S.E. 2d at 181.

A criminal defendant may not be asked if he has been arrested or indicted for a specific offense, but he may, for the purpose of impeachment, be asked if he has committed criminal acts or other specific acts of reprehensible conduct, provided the question is in good faith. *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Williams, supra*. The record shows that defendant was in fact indicted at the time of this trial for the rape of Kathy Cox on April 5, 1974; hence, there was ample basis for this question to be asked in good faith. This assignment is without merit.

Finally, defendant contends that the judgment imposing the death penalty contravenes the Eighth and Fourteenth Amendments to the Constitution of the United States.

[7] The questions raised by the defendant have been raised in a number of recent cases before the Supreme Court of North Carolina. The answer in each is that the judgment of death does not contravene the Eighth and Fourteenth Amendments. *See State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Dillard*, 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973). We adhere to our decisions in those cases.

It is noted that the court's charge was not brought forward in the record. Therefore, it is presumed that the jury was clearly charged as to the law arising upon the evidence as required by G.S. 1-180. 3 Strong, N. C. Index 2d, Criminal Law § 158 (1967); *State v. Moore, supra; State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968).

We have carefully reviewed the entire record in this case and have considered every contention and argument advanced by defendant. Our examination discloses that defendant received a fair trial, free from prejudicial error.

No error.

Chief Justice SHARP dissenting as to the death penalty:

The rape for which defendant was convicted occurred on 7 July 1973, a date between 18 January 1973, the day on which the opinion in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, was filed and 8 April 1974, the day on which the 1973 General Assembly rewrote G.S. 14-21 at its second session by the enactment of Ch. 1201, Sec. 2, N. C. Sess. Laws (1973). For the reasons stated in the dissenting opinion of Chief Justice Bobbitt in *State v. Jarrette*, 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974), an opinion in which Justice Higgins and I joined, I dissent as to the death sentence and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissents in *State v. Waddell, supra* at 453 and 476, 194 S.E. 2d at 30 and 47.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422 at 437, 212 S.E. 2d 113 at 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975).

STATE OF NORTH CAROLINA v. FRANK JAMES SILVER

No. 35

(Filed 14 April 1975)

1. Criminal Law § 76— admissibility of confession — consideration of voir dire evidence only improper

In determining the admissibility of a confession, the Court must look to the entire record, not merely to the evidence presented on a *voir dire* hearing.

2. Criminal Law § 76— involuntary confession — admissibility of subsequent confession — presumption

Where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior

Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

75-5032

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1975

****

CRAWFORD DEAN LOWERY,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

RESPONSE OF THE STATE OF NORTH CAROLINA
TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

****

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ATTORNEYS FOR RESPONDENT

Dated:

INDEX

Page

Citation to Opinions Below 1

Jurisdiction 1

Questions Presented 1

Statement of Case 2

Reasons for Not Granting the Writ 2

I. The Court should not grant certiorari to consider whether the imposition and carrying out of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth and Fourteenth Amendments to the Constitution of the United States 2

II. A verdict by a jury ignorant that death is the mandatory consequence does not constitute a violation of the Eighth and Fourteenth Amendments of the Constitution of the United States 3

III. The Court should not grant certiorari in this case because the petitioner has not exhausted his remedies under the Law of North Carolina 4

Conclusion 5

TABLE OF CASES

Fowler v. North Carolina,
No. 73-7031 (Oct. Term 1974) 2,3

Furman v. Georgia, 408 US 238 (1972) 3,4

State v. Britt, 285 NC 256
204 SE 2d 817 (1974) 3,4

State v. Waddell, 282 NC 431
194 SE 2d 19 (1972) 3,4

Statutes:

H. B. 953, Chap. 749, (1975) N. C. Sess. 5

N. C. Gen. Stat. §14-21 (1974) 4,5

IN THE

SUPREME COURT OF THE UNITED STATES

CRAWFORD DEAN LOWERY,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

RESPONSE OF RESPONDENT,
STATE OF NORTH CAROLINA,
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 286 NC 698 (1974) and is appended to Petitioner's petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3).

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the Due Process Clause of the Fourteenth Amendment permits a State Court death sentence to be predicated upon a verdict rendered by a jury which did not know for certain that the consequences of a guilty verdict was a sentence of death?

3. Whether the United States Supreme Court should grant certiorari when the petitioner has not fully exhausted his right to appellate review at the state level?

STATEMENT OF THE CASE

Petitioner, Crawford Dean Lowery, was tried in the Superior Court of Alamance County, North Carolina, and was found to be guilty of the crime of rape. A sentence of death by asphyxiation of gas was pronounced. Petitioner appealed to the Supreme Court of North Carolina and the judgment was affirmed on the 14th day of April, 1975. Execution of the judgment was stayed in order to give Petitioner an opportunity to file a petition for a Writ of Certiorari in this Court.

Since the facts of this case have been fully stated by the Petitioner, and have been amplified in the opinion of the Supreme Court of North Carolina, they are not restated here.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

PETITIONER'S QUESTIONS 1, 2, 3 and 4

The petitioner has listed a total of six questions. The first four questions challenge that the imposition of the death penalty for the crime of rape violates the Eighth and Fourteenth Amendments to the Constitution of the United States. For this reason the State has combined these four questions into one question.

The petitioner asserts that the penalty of death is cruel and unusual punishment for non-injurious rape offenses. He also urges that the procedure through which the death penalty is applied under the law of North Carolina violates the Eighth and Fourteenth Amendments. Petitioner's assertions, in essence, question the propriety of the North Carolina Legislature to prescribe punishment. There is no valid reason for the Court to grant certiorari at this time to hear this question.

This Court granted certiorari to petitioner Jessie Thurman Fowler in the case of Fowler v. North Carolina, No. 73-7031 (Oct. Term, 1974) which, although a murder case, concerns both the issue of the constitutionality of the death penalty and the question as to whether penal policy is more appropriately to be reviewed by the Legislature than by the Judiciary. Extensive briefs were submitted in that case and oral arguments were made before this

Court on April 21, 1975. Hence, petitioner's question has, in essence,been accepted for hearing by the Court, and oral arguments before this Court have already been made. Therefore, any decision in this case should be dependent upon the outcome of the Fowler case, and the petition to grant certiorari should be denied.

II. A VERDICT BY A JURY IGNORANT THAT DEATH IS THE MANDATORY CONSEQUENCE DOES NOT CONSTITUTE A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

PETITIONER'S QUESTIONS 5 and 6

In questions five and six of his petition, the petitioner asserts that the Eighth and Fourteenth Amendments of the Constitution are violated whenever a jury is allowed to enter a finding of guilt without knowing that the death penalty automatically will ensue. And it is urged that the Supreme Court of North Carolina has failed to clearly state whether a judge should inform the jury that a verdict of guilty will invoke the mandatory penalty of death.

The petitioner does not state nor does the record indicate whether the jury at this trial was either aware or unaware that the death penalty was mandatory upon a verdict of guilty. Regardless, the respondent would argue that jury knowledge that a verdict of guilty invokes the mandatory penalty of death could lead to the very exercise of jury discretion that this Court sought to curtail in Furman v. Georgia, 408 US 238 (1972).

That this is the position of the North Carolina Supreme Court is clearly set out in the case of State v. Britt, 285 NC 256 204 SE 2d 817 (1974). There, the Court reiterates the position taken in State v. Waddell, 282 NC 431, 194 SE 2d 19 (1972) in which it stated:

> "The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge." 282 NC 445, 194 SE 2d 29 (1972)

In its opinion, the Court foresees deviation from this rule only in rare situations where the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence and sufficient compelling reason exists to justify informing the jury of the consequence of their possible verdict. State v. Britt, supra. And, the Court endorses the established doctrine that in a capital case, both the State and the defendant may, on the voir dire examination of prospective jurors, make inquiry con-

cerning a prospective juror's moral or religious scruples, his beliefs, and attitudes toward capital punishment, to the end that both the defendant and the State may be insured a fair trial before an unbiased jury. State v. Britt, supra.

The record does not disclose whether the jury was asked if any juror had any religious or moral scruples against the death penalty. And the defendant did not take exception to the trial judge's charge to the jury. Consequently, the record is silent as to whether the trial judge used any language that would indicate whether or not the jury was informed as to the penalty.

It would appear then, that the state of the law as espoused by the North Carolina Supreme Court on the issue of whether the jury should be aware of a mandatory death sentence requires no clarification; accordingly, the petitioner has failed to show prejudice. Therefore, certiorari need not be granted.

III. THE COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE BECAUSE THE PETITIONER HAS NOT EXHAUSTED HIS REMEDIES UNDER THE LAW OF NORTH CAROLINA.

Prior to the Waddell decision, under the North Carolina rape statute, (N. C. G. S. 14-21), the jury had the right to recommend life imprisonment for the capital crime of rape. Furman v. Georgia, supra, ruled that this discretion was unconstitutional. In State v. Waddell, supra, the Supreme Court of North Carolina ruled that the death penalty portion of the rape statute was constitutional, but the portion concerning the jury's discretion was not and that any person convicted of a capital offense prior to the Waddell decision and who had been sentenced to death, would have the sentence commuted to life imprisonment. In all capital cases after Waddell the trial court was forbidden to allow the exercise of jury discretion in sentencing and upon conviction of a capital crime, the death sentence was mandatory. The rape statute was amended by the North Carolina Legislature through the ratification of N. C. G. S. 14-21 (Supp. 1974) which divided the crime of rape into two categories, i.e., First and Second Degree Rape. But this enactment did not become effective until April 8, 1974. Consequently, there existed a period of time between the decision in Waddell and the ensuing action of the Legislature, in which numerous individuals received death sentences under a statute which had been, in effect, established by the

Judiciary rather than the Legislature.

In order to remedy this situation, the 1975 Session of the General Assembly of North Carolina enacted House Bill 953, a copy of which is appended to this response. This statute provides that defendants who have been convicted of rape committed after January 18, 1973, and prior to April 8, 1974, and who have had the verdict and sentence of death sustained on appeal, may apply to the judge who presided at the rape trial resulting in the sentence of death, or, if said judge is unavailable, to a resident Superior Court Judge of the judicial district in which the rape trial was held, to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of N. C. G. S. 14-21 (Supp. 1974).

Whereas the date of petitioner's conviction falls within the time span qualifying him for the special judicial determination provided by House Bill 953, the appellate channels which exist under North Carolina Law have not been totally exhausted by the petitioner. Therefore, the State would submit that the Petition for a Writ of Certiorari to the Supreme Court of North Carolina should be denied.

CONCLUSION

It is therefore respectfully submitted that the question concerning the constitutionality of the death penalty as applied under the Law of North Carolina is already before this Court; that there is no evidence that petitioner was deprived of any constitutional right by the fact that some members of the Trial Court jury may have been unaware that their verdict would invoke a mandatory penalty of death; and that the petitioner has not fully exhausted the channels for appellate review provided under North Carolina Law. The Petition for Writ of Certiorari to the Supreme Court of North Carolina should be denied.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

(Signatures continued on next page)

/s/ Charles M. Hensey

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Assistant Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response of the State of North Carolina to Petition for Writ of Certiorari to the Supreme Court of North Carolina on petitioner by depositing the same in the United States mail to:

Mr. Donnell S. Kelly
Attorney at Law
P. O. Drawer 671
Graham, North Carolina 27253
ATTORNEY FOR PETITIONER

This the 22nd day of July, 1975.

/s/ Charles M. Hensey
Charles M. Hensey

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1975
RATIFIED BILL

CHAPTER 749

HOUSE BILL 953

AN ACT RELATING TO PUNISHMENT FOR RAPES COMMITTED PRIOR TO THE EFFECTIVE DATE OF CHAPTER 1201, SESSION LAWS OF 1973.

The General Assembly of North Carolina enacts:

Section 1. The provisions of G.S. 14-21, as rewritten by Section 2 of Chapter 1201 of the Session Laws of 1973, shall apply in all trials hereafter conducted for rapes committed after January 18, 1973, and prior to April 8, 1974, the effective date of Chapter 1201, Session Laws of 1973.

Sec. 2. (a) In cases in which the defendant has been convicted of a rape committed after January 18, 1973, and prior to April 8, 1974, and the verdict and sentence of death are or have been sustained on appeal, the defendant may apply once to the judge presiding at the rape trial resulting in the sentence of death, or, if said judge is unavailable, to a resident superior court judge of the judicial district in which said rape trial was held, to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of Chapter 1201, Session Laws of 1973.

(b) Said judge shall review a certified transcript of the evidence presented at trial (or if such transcript is not available, the record on appeal), make such independent investigation as he deems necessary to determine the age of the defendant or of the rape victim, and hear arguments or accept

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both in behalf of the defendant and the State.

(c) Thereupon, the judge shall determine the following question:

Is the evidence presented at the defendant's trial, plus additional evidence of the age of the defendant or the age of the rape victim, sufficient to submit the defendant's case to a jury on the charge of first degree rape as defined by G.S. 14-21(a), had the date of the rape been after April 8, 1974?

(d) If the question is answered in the affirmative, the defendant shall remain subject to the sentence of death. If the question is answered in the negative, the judge shall forthwith schedule a hearing for the presentation of evidence relative to resentencing the defendant; after the hearing, the sentence of death for rape previously imposed shall be vacated, and the defendant shall be resentenced as if he had been convicted of second degree rape for a rape committed after April 8, 1974.

(e) There shall be no right of appeal from the determination of the judge, but the Supreme Court of North Carolina may, upon petition for certiorari, allow review of said determination.

(f) In cases of resentencing, the defendant shall be allowed credit for time spent in custody awaiting the execution of the sentence of death.

Sec. 3. An indigent person under sentence of death for a rape committed after January 18, 1973, and before April 8, 1974, shall be entitled to counsel in making one application under this act for each such sentence of death, if he is otherwise entitled under Article 36 of Chapter 7A of the General

Statutes of North Carolina.

Sec. 4. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 24th day of June, 1975.

JAMES B. HUNT, JR.

James B. Hunt, Jr.

President of the Senate

JAMES C. GREEN, SR.

James C. Green, Sr.

Speaker of the House of Representatives